

114th Session

Judgment No. 3165

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr I. A. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 13 August 2010 and corrected on 22 December 2010, Eurocontrol's reply of 8 April 2011, the complainant's rejoinder of 10 July, the Agency's surrejoinder dated 14 October 2011, the complainant's additional submissions of 29 March 2012 and the Agency's final comments of 17 April 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out in Judgment 2490, delivered on 1 February 2006, on the complainant's second complaint. Suffice it to recall that the complainant, a Danish national born in 1961, joined Eurocontrol on 16 January 1998 as a Controller, 1st class, based at the Agency's Upper Airspace Control Centre in Maastricht (Netherlands). He was appointed at grade B3, step 6, based on his previous experience as a controller at a highly qualified level,

pursuant to the version then in force of Article 7(a) of Annex V to the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre. Through automatic advancement the complainant reached the last step of grade B3 (step 8) in January 2002.

With effect from 1 April 2004 he was promoted to grade B2, step 4, and was credited with ten months' seniority in that step. Through automatic advancement he reached step 5 of grade B2 on 1 June 2005.

As from 1 January 2006 the Agency created an "O" grades structure for executive operational staff and operational support staff of the Operations Room at the Maastricht Centre and adopted a series of amendments to the General Conditions of Employment, including Annex XV entitled "Definition of career span and career progression in posts pertaining to category O". The corresponding Rules of Application were also amended. As a result, operational staff members were no longer classified in the A, B and C categories. The new structure comprises eight grades from O1 to O8. Grades O1 through O6 are each divided into eight steps and grade O7 is divided into six steps, as is grade O8. According to Paragraph 2 of the Sole Article of Annex XV, "[a]fter being integrated into category O, servants promoted to a post within category O will be appointed to the step in the higher grade guarantying a basic salary at least equal [to] or immediately superior to the one they held in their grade before promotion". Paragraph 3 of that Article further provides that "[s]ervants will [...] be promoted to grade O4, grade O5 and grade O6 and will remain in each of these grades for 5 years. They will be promoted to grade O7 and will progress to step 6 of that grade."

As a result of these measures, the complainant was placed in grade O5, step 5, with effect from 1 January 2006. Through automatic advancement, he reached step 6 of grade O5 on 1 June 2007.

By a decision of 30 October 2009 the Director General promoted the complainant to grade O6 with effect from 1 April 2009 and placed him in step 3 of that grade. The complainant challenged that decision by submitting an internal complaint on 7 December 2009. He

explained that, because of the way in which the Agency's salary and promotion system operated, after two successive promotions, the ten years of seniority that had been recognised at the time of his initial appointment had, in effect, been reduced to four. He therefore requested the Director General to promote him to grade O6, step 6, as of 1 April 2009 in order to "restore [his] initial seniority". The matter was referred to the Joint Committee for Disputes, which, having found that Eurocontrol had fully complied with the relevant provisions regarding career progression, unanimously recommended that the internal complaint be rejected as unfounded. The Principal Director of Resources, acting by delegation of authority from the Director General, informed the complainant that, in accordance with the reasons given by the Committee, his internal complaint was rejected as legally unfounded. That is the impugned decision.

B. The complainant submits that the relevant provisions of the General Conditions of Employment discriminate against servants who are recruited as fully qualified controllers (commonly known as "conversion controllers"). Although the quality and length of any previous experience they hold is taken into consideration for the purpose of assigning their grade and step upon appointment, once appointed they are subject to the same provisions as controllers who have received their training with Eurocontrol. He states that the career span of air traffic controllers at the Agency is essentially a system based on seniority, whereby controllers are promoted according to a predefined career progression which, as of 1 January 2006, is prescribed by Annex XV to the General Conditions of Employment. However, when promoted to the next highest grade, conversion controllers are not automatically granted the same step they were assigned upon their appointment. In the complainant's view, because the value of steps increases significantly as controllers advance in grade and because conversion controllers are advancing "outside the normal career span", the seniority they were initially granted is lost, over the duration of their career, with each promotion. Furthermore, because of their age upon recruitment, most conversion controllers will be unable to progress, before they retire, to the highest grade and

step attainable. In contrast, the relative seniority of controllers who have received their basic training at the Agency remains constant.

In support of his arguments, the complainant submits two tables which compare the career span of a conversion controller with experience similar to his own to that of a controller whose training was acquired within Eurocontrol. He contends that, in comparison to the latter, he suffered a loss of seniority upon his promotions in 2004 and 2009 and he will do so again when he is promoted in 2014. In addition, he asserts that a controller trained by the Agency who held ten years of experience at the time he – the complainant – was appointed would have held a higher grade and step and earned a higher salary than him throughout his or her entire career. Referring to the Tribunal's case law, he asserts that as he is not receiving the same remuneration for his work as an Agency-trained controller with comparable experience, and as he is doing work of equal value, this is a breach of the principle of equality.

He asks the Tribunal to order Eurocontrol to appoint him at grade B2, step 3, with four years' seniority, with effect from 16 January 1998. Subsidiarily, he asks to be granted grade B2, step 6, with effect from 1 April 2004, and grade O6, step 6, with effect from 1 April 2009. In any event, he seeks all consequential relief, including moral damages, plus interest. He also claims costs.

C. In its reply Eurocontrol objects to the receivability of the complaint on a number of grounds. Firstly, the complainant has failed to prove that there was any breach of the terms of his appointment or of the statutory provisions related to career progression and promotion and, consequently, his complaint is irreceivable. Secondly, as he accepted his letter of engagement and the terms therein and failed to challenge them by lodging an appeal within the prescribed time limits, his appeal is now time-barred. Thirdly, as the Tribunal has previously held in Judgment 2490 that the Director General's decision to promote the complainant to step 4 of grade B2 in 2004 was legally correct, according to the principle of *res judicata* that decision cannot now form the basis of another complaint against the Agency. Fourthly, his

request to be appointed to grade B2, step 3, with effect from 16 January 1998 constitutes a new claim which was not included in his internal complaint and it is therefore irreceivable for failure to exhaust the internal means of redress.

On the merits, the Agency contends that the complainant has been awarded the correct grades and steps, without any loss of salary or career prospects, and that he has failed to prove his allegations of discrimination or unlawful treatment. At the time of his appointment, his previous work experience was considered and converted into ten years of relevant service (notional seniority) and, as a result, he was recruited at the highest grade and step possible at the time. Following his appointment, he progressed in his career according to the same rules applicable to all controllers.

It points out that servants have no right to identical career progression and promotions, and that the complainant has not provided evidence showing that another servant, appointed at the same grade and step and having the same duties and experience as he, was assigned grade B2, step 6, in 2004 and grade O6, step 6, in 2009.

Referring to Judgment 2941, Eurocontrol argues that the Tribunal has previously held that the Agency's rules pertaining to career progression and promotion are lawful and compatible with the general principle of equal treatment. Servants are guaranteed at least the same basic salary as they received before promotion to the next higher grade, and the complainant's salary and seniority in his former grades and steps were duly taken into account. The Agency contends that there is no statutory provision prescribing that servants must be promoted to the next grade at the same step, and it states that seniority starts afresh with each promotion.

D. In his rejoinder the complainant presses his pleas. Relying on the case law, he asserts that his complaint is receivable because he is objecting to discriminatory treatment and this can be done at any time. Furthermore, he contests that the *res judicata* rule applies to the present case because the legal issues in his previous case were different. In addition, he points out that he is not asserting that the

relevant provisions regarding career progression have not been followed, but rather that they discriminate against conversion controllers.

On the merits, he argues that the only relevant difference between controllers with similar qualifications is their experience, and although the relevant provisions appear to be proportionate because they take into account prior experience at the time of a conversion controller's appointment, that notional seniority is not maintained upon promotion. As a result, conversion controllers are not guaranteed equal pay for work of equal value. By way of example, he points out that when he is next promoted in 2014 he will be graded just one step higher than Mrs T. (a controller who received her training at the Agency), which corresponds to two years' seniority more than her, despite the fact that more than one year before she became a fully qualified controller he was granted ten years' notional seniority.

E. In its surrejoinder the Agency maintains its position in full. It disputes the complainant's allegations of discrimination and contends that, upon appointment, conversion controllers are not in the same factual position as Eurocontrol-trained controllers. The prior training and job experience held by a conversion controller generally results in the award of a higher grade at recruitment and higher earnings throughout his or her career as compared to "average" controllers. Furthermore, the relevant provisions create equity between experienced and less experienced controllers by allowing them to advance in their careers according to the same rules. The Agency rejects his comparison with Mrs T., asserting that both he and she receive equivalent and fair remuneration for their work and that, in any event, Mrs T.'s grading and salary are lower than that of the complainant.

F. In his additional submissions the complainant argues that the only relevant difference between fully qualified controllers doing the same work is the accumulated experience they draw upon when performing their duties, and it is this experience that determines the value of their work. He reiterates that he does not receive equal pay for work of

equal value in comparison to controllers who received their training at the Agency and who, at the time of his appointment, had accumulated comparable experience.

G. In its final comments the Agency maintains that the complaint is irreceivable and without merit.

CONSIDERATIONS

1. The complainant joined the Agency as a Controller, 1st class, at grade B3, step 6, with effect from 16 January 1998. Over the course of the following four years, he progressed to the highest step in that grade (step 8) through automatic advancement. He was promoted to grade B2, step 4, with ten months' seniority, with effect from 1 April 2004, in accordance with the relevant provisions of the General Conditions of Employment which, at the material time, provided inter alia that servants appointed to a higher grade shall in no case receive a basic salary lower than that which they would have received in their former grade. Following the adoption of a new grades structure, the complainant was placed in grade O5, step 5, with effect from 1 January 2006. He was promoted to grade O6, step 3, with effect from 1 April 2009. He appealed against that decision and asked to be promoted instead to grade O6, step 6, as of 1 April 2009 in order to preserve his seniority. The Joint Committee for Disputes unanimously recommended that his internal complaint be rejected. The internal complaint was rejected as legally unfounded in accordance with the analysis and conclusions of the Committee, and by a memorandum dated 17 May 2010 the complainant was so notified. He impugns that decision before the Tribunal.

2. The complainant asks to be appointed to grade B2, step 3, with four years' seniority as from 16 January 1998 and he seeks all consequential relief, as well as interest. By this claim the complainant impugns the decision to appoint him as from 16 January 1998 at grade B3, step 6. Since the complainant failed to exhaust all internal means of redress prior to filing his complaint with the Tribunal there

was no final decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal. Hence, the claim must be dismissed as irreceivable.

3. Subsidiarily, he asks to be granted grade B2, step 6, (rather than grade B2, step 4) as from 1 April 2004, and he seeks all consequential relief, as well as interest. This claim is barred by *res judicata*. In Judgment 2490, the Tribunal held that the decision to promote the complainant to grade B2, step 4, was legally correct. It is consistent with the general principle of *res judicata* that the Tribunal shall not entertain claims on the same subject, involving the same parties, which it has already decided.

4. The complainant alleges that Eurocontrol discriminates against “conversion controllers”, i.e. servants who are recruited as fully qualified controllers. He provides evidence which, in his view, demonstrates that controllers who receive their training at the Agency progress more rapidly in their careers than conversion controllers. He argues that, while the relative seniority of Agency-trained controllers remains constant, the same is not true for conversion controllers because their seniority upon appointment is not maintained when they are promoted to the next grade. Consequently, according to the complainant, the career system applicable to controllers does not respect the principle of equal pay for work of equal value. The Tribunal notes that in Judgment 2490 it clarified the reason why servants with the same seniority at a point in time can experience different career progression. It stated under considerations 4 and 7:

“4. It is important to note at this stage – and the Tribunal will elaborate on this later – that Article 46 of the General Conditions of Employment refers to promotion to the ‘next higher grade’ by ‘selection’ and to a ‘higher category’ by ‘competition’.

Article 47, on the other hand, provides for the manner in which the seniority of a staff member appointed to a higher grade shall be determined. To that end it establishes the distinction, quite analogous in the English and French texts, between ‘notional’ steps, and ‘actual’ or real steps. Further, the system of seniority pay rises by means of notional steps

has one built-in limitation: it does not apply to the final real step in each grade.

[...]

7. Further, there is logic in the system adopted by Eurocontrol. If a staff member has reached the last step of a grade, he acquires no seniority in that step even if he remains in it until the end of his career. The automatic advancement by seniority is not infinite: it ends when the staff member reaches the last step of his current grade; although it will start again if and when he is promoted to a new grade, the staff member in question will not benefit from seniority in terms of notional steps acquired in the last real step in his former grade. This can reasonably be understood to mean that, in addition to advancement by seniority alone, advancement through selection or competition is encouraged, which seems consistent enough with the intent of the system established by Articles 46 and 47, and reasonable as well in a career system.”

In the light of these considerations, the complainant’s allegations of discrimination and violation of the principle of equal pay for work of equal value are unfounded.

5. Moreover, the complainant asks to be promoted to grade O6, step 6, with effect from 1 April 2009 and to be awarded all consequential relief, plus interest. The complainant was in grade B2, step 5, when the new grade structure was implemented. As a result of the new structure he was placed in grade O5, step 5. Considering that his placement in that grade was lawful in light of paragraph 2 of the Sole Article of Annex XV and Annex III of the General Conditions of Employment, the Tribunal finds that his subsequent automatic advancement to step 6 was also lawful. The complainant has not provided any evidence that his consequent promotion to grade O6, step 3, with effect from 1 April 2009, was mistaken or unlawful, or that it was in breach of the General Conditions of Employment.

6. As all the pleas fail, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Giuseppe Barbagallo
Michael F. Moore
Catherine Comtet